UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTINE ADAMS, individually and as EXECUTRIX FOR THE ESTATE OF PHILIP ABRAHAMS,

Plaintiff,

-against-

TRUDY WESTE WILLIAMS; JPMORGAN CHASE BANK, N.A.; ROBERT E. SLATUS; LORENA MEJIA as EMPLOYEE of JPMORGAN CHASE BANK, N.A. and LORENA MEJIA individually; PUBLIC ADMINISTRATOR OF NEW YORK COUNTY; ATTORNEY GENERAL OF THE STATE OF NEW YORK and JOHN AND JANE DOE 1-10,

Defendants.

Case No. 16-CV-9677 (JSR)

DEFENDANT JPMORGAN CHASE BANK, N.A.'S MEMORANDUM OF LAWIN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Defendant JPMorgan Chase Bank, N.A. ("Chase") submits this memorandum of law in support of its motion to dismiss the Second Amended Complaint ("SAC") pursuant to Fed. R. Civ. P. 12(b)(1), (6) and 9(b).

PRELIMINARY STATEMENT

Plaintiff is a remote non-blood of Philip Abrahams (the "decedent" or "Abrahams") and is alleged to be the executrix of his estate. She has sued Chase for allegedly wrongly accepting from Abrahams' caregiver, defendant Trudy Weste Williams ("Williams"), a notarized statutory short form power of attorney ("Power of Attorney"), authorized by Article 5, Title 15 of New York's General Obligations Law, naming Williams as agent. Plaintiff claims that Abrahams' notarized signature was forged on the Power of Attorney, and that because Chase accepted it, Williams was able to establish a joint account with Abrahams and withdraw money.

Plaintiff claims that Chase breached its contract with Abrahams by (i) accepting the notarized statutory short form Power of Attorney rather than requiring the decedent and Williams to execute Chase's own alleged form of power of attorney; and (ii) not independently verifying Abraham's notarized signature on the Power of Attorney. She also alleges, in wholly conclusory fashion, that one or more unspecified Chase employees (the Does in the caption) were in cahoots with Williams and/or the lawyer who notarized the Power of Attorney, and knew that the Power of Attorney had been forged. Plaintiff alleges, as against Chase, claims for fraud (first cause of action); breach of contract (third cause of action); and breach of the duty of good faith and fair dealing (fourth cause of action).

All three claims against Chase should be dismissed for the following reasons:

- The SAC fails to state a claim for fraud because it does not allege that Chase made any intentionally false statement; it does not allege that plaintiff relied on any false statement made by Chase or anyone else; and the allegations it does make are wholly conclusory.

- The SAC fails to state a claim for breach of contract, because the applicable contract—Chase's Deposit Account Agreement (the "Deposit Account Agreement")—authorized Chase to accept the Power of Attorney. Indeed, under New York law, Chase was prohibited from rejecting the statutory form, which was regular on its face, and insisting that Plaintiff execute a form power of attorney created by Chase. Furthermore, Chase was not required, either pursuant to the Deposit Account Agreement or New York law, to independently verify the authenticity of Abraham's notarized signature on the Power of Attorney.

- The SAC's claim for breach of the duty of good faith and fair dealing is wholly duplicative, and therefore redundant, of the breach of contract claim.

- The claims asserted against Chase in the SAC are time-barred by virtue of a two-year contractual limitations period set forth in the Deposit Account Agreement. Based on the SAC, Chase accepted the Power of Attorney, and established the joint account, in the months before Abrahams' death on November 1, 2012, but plaintiff did not file this lawsuit until October 19, 2016, more than three years later.

Finally, if the SAC is not dismissed in its entirety, then plaintiff's claims should be dismissed to the extent that she sues in her individual capacity, apparently based on her status as a prospective beneficiary of Abraham's will. The law is clear that a beneficiary does not have standing to sue.

FACTS

The facts summarized below are based on (i) the allegations of the SAC; and (ii) two documents that are incorporated by reference in the SAC and/or are integral to it, and which are submitted by Chase on this motion, specifically the Power of Attorney and the Deposit Account Agreement.

A. The Allegations of the Second Amended Complaint

Plaintiff, a remote non-blood relative of the decedent and the executrix of his estate, sues in her capacity as executrix as well as individually. SAC ¶¶ 1, 12 and caption.[1] According to the SAC, Williams, a caregiver for Abrahams, contacted attorney Robert E. Slatus to assist her with executing the Power of Attorney, pursuant to which she became the "agent over much of Abrahams' affairs." ¶¶ 3, 6-8, 15-16, 28. The SAC further alleges that the Power of Attorney, "prepared and notarized by Slatus" on July 12, 2012, was forged, in that it was not signed by Abrahams. ¶ 8, 28-29.

In the months prior to Abrahams' death on November 1, 2012, Williams presented the Power of Attorney to Chase, where Abrahams maintained a checking and savings account. Plaintiff alleges that Chase "accepted the untruthful representations of Williams and the False Power of Attorney," and allowed Williams to establish a joint account with Abrahams on which she had signing authority. ¶¶ 26, 41, 43, 44. Williams then both deposited funds into the joint account and withdrew all of the funds in it. ¶ 61.

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[1] The SAC is annexed to the declaration of Andrea Likwornik Weiss dated February 17, 2017. References to paragraphs of the SAC are denoted by "¶" followed by a paragraph number or numbers.

The SAC further alleges that, the Power of Attorney notwithstanding, Abrahams "did not provide Chase with authorization to add Williams to Abrahams' account at Chase." ¶ 45. Plaintiff complains that Chase should have compared Abrahams' signature on the Power of Attorney to any signature cards on file and that Chase should have known that the Power of Attorney was forged. ¶¶ 47, 49. Moreover, according to the SAC, Chase has a procedure for determining if a power of attorney is forged, as well as its own form power of attorney, which bank customers are required to use. ¶¶ 50-51. The SAC then goes on to make a series of wholly conclusory allegations that an unspecified John or Jane Doe employee of Chase (i) did not follow Chase's alleged procedures for determining if a power of attorney is valid; (ii) knew that the Power of Attorney was a forgery, but nevertheless agreed to accept it; and (iii) received "compensation" from Williams. ¶¶ 52-58.

The SAC alleges that, on January 18, 2013 (after Abrahams' death), Chase supplied plaintiff's counsel with bank statements and identified "Lorena Mejia" as the person who "assisted and aided Williams" in setting up the joint account. ¶ 98-99. Plaintiff concedes, however, that she received no other information about Mejia other than that she was involved in setting up the account. ¶ 99. There is not a single factual allegation in the complaint that *Mejia* failed to follow procedures, or knew the Power of Attorney was forged, or colluded with Williams in exchange for "compensation." Indeed, plaintiff carefully limits these conclusory allegations—not factually supported as to anyone— to a "Doe."

Based on the foregoing allegations, Plaintiff asserts claims against Chase for fraud (first cause of action); breach of contract (third cause of action), and breach of the duty of good faith and fair dealing (fourth cause of action). Both the Third and Fourth Causes of Action are based on the theory that Abrahams "had entered an agreement with Chase to have an account with Chase," and thus Chase was contractually required to protect his money from third-party misappropriation, which it breached by accepting the power of attorney and allowing Williams to have a joint account with him. ¶¶ 112-13, 116-17. Plaintiff demands compensatory damages of $500,000, ¶¶ 106, 114, 118, and punitive damages of $1,000,000. SAC, "Wherefore" clause, at 18.

B. The Documents Incorporated by Reference in and Integral to the Second Amended Complaint

On this motion, Chase submits a copy of the Power of Attorney in its records. Declaration of Benjamin Chun, dated February 16, 2017 ("Chun Decl."), Ex. 1.

Chase also submits the Deposit Account Agreement in effect during the period that the alleged events occurred. Declaration of Laura L. Deck, dated February 10, 2017 ("Deck Decl."), Ex. 1. That Agreement contains the following provision regarding powers of attorney:

> **Powers of attorney**
> If you wish to designate an agent under a power of attorney, you must do it in a form we deem acceptable. We may refuse to honor any power of attorney presented to us, or refuse to recognize a successor agent, even if the successor agent is named in a power of attorney that we have previously honored, unless state law requires otherwise. In addition, we may refuse to follow an agent's instruction to make the agent a joint owner or a POD or ITF beneficiary of an account, but we have no liability to anyone if we do so. We may rely on a power of attorney until we receive written notice that it has been revoked either from you or as a matter of law (for example, by your death).

Id. § F.1.vii, at 13. The Agreement also contains a two-year limitations period for commencing an action:

> You must file any lawsuit or arbitration against us within 2 years after the cause of action arises, unless state law or an applicable agreement provides for a shorter time.

Id. § I.9, at 16.

ARGUMENT

THE APPLICABLE PLEADING STANDARDS

"To survive a Rule 12(b)(6) motion to dismiss, the complaint must include 'enough facts to state a claim to relief that is plausible on its face.' A claim will have 'facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Wilson v. Dantas*, 746 F.3d 530, 535 (2d Cir. 2014) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The plausibility standard is satisfied only if the well-pleaded factual allegations allow the court to draw a reasonable inference of liability. *Id.* Under this standard, a complaint must show more than the "possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. A "complaint [that] pleads facts that are 'merely consistent with' a defendant's liability …'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

While a court evaluating the sufficiency of a complaint is required to accept factual allegations as true, legal conclusions set forth in a complaint are not entitled to any assumption of truth. *Iqbal*, 556 U.S. at 678; *see also*, *Twombly*, 550 U.S. at 555 (court is not bound to accept as true "a legal conclusion couched as a factual allegation"). "Nor does a complaint suffice if it tenders 'naked assertion[s]" devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *see also Thomas & Agnes Carvel Found. v. Carvel*, 736 F. Supp. 2d 730, 756 (S.D.N.Y. 2010) (same).

Fraud claims are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b). "To satisfy this Rule, a complaint alleging fraud must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 25 (2d Cir. 2016) (internal quotation marks and citation omitted); *see also Yellow Cab SLS Jet Mgmt. v. Schwartz*, No. 13-CV-7575 (JSR), 2014 WL 2111688, at *1 (S.D.N.Y. 2014). Additionally, plaintiffs asserting a fraud claim "must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 52 (2d Cir. 1995).

"Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered" on a motion to dismiss pursuant to Rule 12(b)(6). *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007). Documents that are not expressly incorporated by reference may also be considered if the documents are nevertheless "integral" to the complaint and, accordingly, a fair object of consideration on a motion to dismiss. *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016). Thus, "[w]here a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (internal quotation marks and citation omitted). "'In most instances where this exception is recognized, the incorporated material is a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint.'" *Goel*, 829 F.3d at 559 (quoting *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006)); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153-54 (2d Cir. 2002) (holding that contracts were properly considered on motion to dismiss complaint where plaintiff referred to and relied on them).

Plaintiff's' SAC fails to meet the standard required to survive Chase's motion to dismiss.

POINT I

THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR FRAUD

The elements of a cause of action for fraud under New York law are: "[1] a misrepresentation or a material omission of fact which was false and known to be false by defendant, [2] made for the purpose of inducing the other party to rely upon it, [3] justifiable reliance of the other party on the misrepresentation or material omission, and [4] injury." *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (internal quotation marks and citation omitted).[2] The claim must be pleaded with particularity under Fed. R. Civ. P. 9(b). *Id. See, supra* at 6-7.

The "fraud" alleged in the SAC is that "Defendant Williams, in agreement with and aided by Chase, Lorena Mejia, and Robert E. Slatus having intentionally created and forged the False Power of Attorney and False Will, and by using said forged instruments to create the Chase Joint Account and further, to obtain death certificates for Abrahams, was able to divest the Estate of Abrahams, and the true beneficiaries under the Original Will, from their rightful distributions under the Original Will." ¶ 105. Putting aside the incomprehensible syntax of the foregoing quoted paragraph, and reading the SAC generously in favor of plaintiff, the SAC fails to state a claim for fraud under any pleading standard.

[2] New York law applies because all of the alleged events and the accounts at issue are located in New York; there is no basis for applying the law of any other state. In addition, the Deposit Account Agreement has a choice of law provision which states that the applicable law is the law in the state where the account is located. Deck Decl. § I.6 at 15.

A. The Second Amended Complaint Fails to Plead A False Statement by Chase

The SAC does not plead the first element of a fraud claim, because there is not a single allegation in it that any Chase employee made any statement, let alone one that was knowingly false, and let alone one that identifies the speaker, when and where the statement was made, and why it was fraudulent . Rather, the complaint alleges that Chase was the *recipient* of false representations made by Williams and an alleged false power of attorney presented to Chase by Williams. ¶ 44. To the extent that the confused language of ¶ 105 is intended to mean that a Chase employee acted with Slatus to create the alleged false power of attorney, there is not a single factual allegation that any Chase employee ever met with, communicated with, or knew Slatus, or had any involvement whatsoever in the drafting of the power of attorney.[3]

The complaint makes conclusory allegations that a Chase employee "knew" that the Power of Attorney "was in fact a forgery." ¶ 53. But having knowledge that a statement or document is false not the same as making the false statement, and it is the latter that is required to plead fraud. *Premium Mortg. Corp.*, 583 F.3d at 108. In all events, plaintiff's conclusory allegations of knowledge, devoid of any factual support, are entitled to no weight on this motion. *Iqbal*, 556 U.S. at 678. Likewise, the complaint's wholly unsupported, 'naked assertion[s], " that some Chase employee "had an agreement" with Williams to add her to the joint account, ¶ 54, and that Williams "compensated" the employee for doing so, ¶ 58, are insufficient to state a claim for fraud even under Fed. R. Civ. P. 8, *Iqbal*, 556 U.S. at 678, let alone under Rule 9(b).

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[3] Paragraph 105 combines claims relating to the Power of Attorney and a will that Slatus allegedly prepared for Abrahams. There is no allegation in the SAC that Chase had anything to do with the will, and accordingly it is not addressed further in this memorandum.

The only actual factual allegation in the SAC regarding a Chase employee is that, in January 2013, Chase supplied plaintiff's counsel with account statements and advised that Lorena Mejia was the banker who "aided Williams in setting up the Joint Chase Account." ¶¶ 98-99. There is no factual allegation at all that Mejia knowingly made any false statement either alone or in conjunction with Slatus or Williams.

B. The Second Amended Complaint Fails to Plead Justifiable Reliance by Plaintiff

The fraud cause of action also is deficient because it fails to plead justifiable reliance by plaintiff. Indeed, there is no allegation that anyone made a false statement to plaintiff (or to Abrahams). Rather, the theory of the complaint is that the allegedly forged Power of Attorney was given *to Chase*, and that Chase, in reliance upon it, allowed Williams to establish a joint account with Abrahams. New York's Court of Appeals has held that third-party reliance does not satisfy the reliance element of a fraud claim. *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 827, 37 N.Y.S.3d 750, 756, *reargument denied*, 28 N.Y.3d 956, 38 N.Y.3d 525 (2016). Thus, plaintiff has no claim based on Chase's reliance on the Power of Attorney.

For all of these reasons, the first cause of action for fraud should be dismissed.

POINT II

PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT BECAUSE CHASE WAS PERMITTED TO ACCEPT THE POWER OF ATTORNEY UNDER THE DEPOSIT ACCOUNT AGREEMENT AND NEW YORK LAW

The third cause of action in the SAC alleges that Chase breached its agreement with Abrahams because it improperly accepted the allegedly forged Power of Attorney. ¶¶ 43-62, 113. As part of these allegations, Plaintiff alleges that "Chase does not accept *pro forma* power of attorney instruments, but instead, requires its customers to use a power of attorney form prepared by Chase." ¶ 51. Because Chase was permitted to accept the Power of Attorney under the Deposit Account Agreement, and the Power of Attorney was otherwise valid on its face, the breach of contract claim should be dismissed.

Chase has submitted the Power of Attorney on this motion, Chun Decl. Ex. 1, and the Court may properly consider it because it is integral to the SAC; indeed, it is the basis for all of plaintiff's claims. *See supra* at 7; *Nicosia*, 834 F.3d at 230. The Power of Attorney is the "statutory short form" of a power of attorney, authorized by Article 5, Title 15 of New York's General Obligations Law. Chun Decl. Ex. 1; *see generally*, N.Y. Gen. Oblig. L. § 5-1501 *et seq.* General Obligations Law § 5-1501B sets forth the requirements for creating a valid power of attorney, which include the acknowledged signatures of both the principal and the agent. N.Y. Gen. Oblig. L. § 5-1501B(1)(b), (c). On its face, the Power of Attorney satisfies those requirements. Chun Decl. Ex. 1 at 4 (principal's acknowledged signature), 5-6 (agent's acknowledged signature).

A third party, such as Chase, has limited discretion to refuse to accept a statutory short form power of attorney. Section 5-1504 of the General Obligations Law provides that "[n]o third party located or doing business in this state shall refuse, without reasonable cause, to honor a statutory short form power of attorney properly executed in accordance with section 5-1501B of this title . . . [or] . . . properly executed in accordance with the laws in effect at the time of its execution." N.Y. Gen. Oblig. L. § 5-1504(1). Although plaintiff alleges that Chase required bank customers to execute Chase's own form of power of attorney, and that it violated its own procedures by not requiring it here, ¶¶ 50-51, the statute in fact specifically prohibits a third party from rejecting the statutory short form power of attorney and requiring instead execution of third party's own form of power of attorney. *Id.* § 5-1504(1)(b)(1) ("It shall be deemed unreasonable for a third party to refuse to honor a statutory short form power of attorney . . . if the only reason for the refusal is . . . the power of attorney is not on a form prescribed by the third party to whom the power of attorney is presented."). Chase's contract with Abrahams—the Deposit Account Agreement, which the court may consider on this motion because it is integral to plaintiff's breach of contract claims, *see supra* at 7; *Goel*, 829 F.3d at 559—recognized this limitation:

> We may refuse to honor any power of attorney presented to us, . . . *unless state law requires otherwise.*

Deck Decl. Ex. 1 § F.1.iv, at 13 (Emphasis added). Furthermore, as is clear from the Deposit Account Agreement, it imposed no duty upon Chase to require a particular form of power of attorney or to do an independent investigation of the validity of a power of attorney.

Nor does plaintiff have a breach of contract claim against Chase based on the theory that Chase should have compared Abrahams' signature on the Power of Attorney to his signatures available in its records. ¶ 47. Under New York law, a third party may rely on a facially valid power of attorney in the absence of circumstances "surrounding its presentation [that] would not put a reasonable person on notice that something was amiss." *E.g., Hudson Enters., Ltd. v. Wasserman*, 256 A.D.2d 550, 550-51, 682 N.Y.S.2d 465, 466 (2d Dep't 1998); *Neildan Constr. Corp. v. Angona*, 209 A.D.2d 389, 390, 619 N.Y.S.2d 590, 590 (2d Dep't 1994). Furthermore, "notarization of a signature creates a presumption in law that the signature is authentic." *Orix Fin. Servs. v. Phipps*, No. 91 CV 2523, 2009 WL 30263, at *4 (S.D.N.Y. Jan. 6, 2009) (citing cases). The Deposit Account Agreement is governed by New York law, Deck Decl. § I.6 at 15, and nothing in that Agreement required Chase to independently verify the authenticity of

Abrahams' notarized signature on the Power of Attorney. Notably, here the complaint does not even identify to whom at Chase the Power of Attorney was presented, let alone make any factual allegations that there was anything "amiss" about the circumstances in which it was presented.

For the foregoing reasons, Chase's acceptance of the Power of Attorney was authorized both by the Deposit Account Agreement and New York law. Accordingly, the breach of contract claim should be dismissed.

POINT III

PLAINTIFF'S CLAIM FOR BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED BECAUSE IT IS DUPLICATIVE OF HER BREACH OF CONTRACT CLAIM

In her fourth cause of action, plaintiff alleges a breach of "the implied duty of good faith and fair dealing" because, allegedly, Chase failed "to protect Abrahams' accounts from being accessed without Abrahams' permission by Williams," permitted "Williams to create the Chase Joint Account through the presentation of the False Power of Attorney," failed "to follow Chase's own internal procedures for determining the validity of a power of attorney," and employed the individual "who willfully assisted Williams in creating the Joint Chase Account knowing that the False Power of Attorney was a forgery." ¶ 117. This claim should be dismissed because it is redundant to plaintiff's claim for breach of contract (third cause of action).

Where a claim for breach of the implied covenant of good faith and fair dealing is brought on the same factual allegations as a claim for breach of contract, it must be dismissed as redundant under New York law. *See, e.g.*, *Avant Capital Partners LLC v. W108 Dev. LLC*, No. 16 Civ. 3359, 2016 WL 7377276, at *3-*4 (S.D.N.Y. Dec. 9, 2016) ("[A] breach of the implied covenant of good faith claim can survive a motion to dismiss only if it is based on allegations different than those underlying the accompanying breach of contract claim." (internal quotation omitted)); *GE Funding Capital Mkt. Servs., Inc. v. Nebraska Invest. Fin. Auth.*, No. 15 Civ. 1069, 2016 WL 4784002, at *5 (S.D.N.Y. Sep. 14, 2016); *Joseph v. Gnutti Carlo S.p.A.*, No. 15-CV-8910, 2016 WL 4764924, at *7-*8 (S.D.N.Y. Sep. 12, 2016). Furthermore, "where the relief sought by the plaintiff in claiming a breach of the implied covenant of good faith is 'intrinsically tied to the damages allegedly resulting from the breach of contract,' there is no separate and distinct wrong that would give rise to an independent claim." *Toto, Inc. v. Sony Music Entm't*, No. 12 Civ. 1434, 2012 WL 6136365, at *14 (S.D.N.Y. Dec. 11, 2012) (quoting *ARI & Co., Inc. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 522 (S.D.N.Y. 2003)).

Here, plaintiff's factual allegations supporting her breach of implied covenant of good faith claim are identical to those alleged in support of her breach of contract claim. *Compare* SAC ¶ 117, *with* SAC ¶ 113. Thus, plaintiff's "claim for the breach of the implied covenant of good faith and fair dealing merely restates [her] breach of contract claim," and must be dismissed. *E.g.*, *Avant*, 2016 WL 7377276, at *4 (dismissing breach of covenant claim that was based upon same allegations as breach of contract claim).

POINT IV

THE CLAIMS ARE TIME-BARRED BY THE CONTRACTUAL LIMITATIONS PERIOD

New York law, which governs Plaintiff's claims under the Deposit Account Agreement, allows parties to agree to a shorter limitations period, as long as the shortened period is reasonable. CPLR § 201 ("An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement.”). *See John J. Kassner & Co. v. New York*, 46 N.Y.2d 544, 551, 415 N.Y.S.2d 785, 789 (1979). Such provisions may shorten the limitations period for actions in both contract and tort. *See Par Fait Originals v. ADT Sec. Sys., Northeast, Inc.*, 184 A.D.2d 472, 472, 586 N.Y.S.2d 2, 2 (1st Dep’t 1992) (enforcing contractual limitations period as to claim for gross negligence); *Diana Jewelers of Liverpool v. A.D.T. Co., Inc.*, 167 A.D.2d 965, 965, 562 N.Y.S.2d 305, 306 (4th Dep’t 1990) (enforcing contractual limitations period as to claims for willful and gross negligence); *cf. Wechsler v. HSBC Bank USA, N.A.*, 15-cv-5907, 2016 WL 1688012, at *4 (S.D.N.Y. Apr. 26, 2016) (where contractual provision applied to “‘any legal action relating to [HSBC’s] handling of your account,’” it applied to statutory claim), *aff’d,* No. 16-1620, 2017 WL 66586 (2d Cir. Jan. 6, 2017).

Applying New York law, courts in this Circuit have found banking contracts with limitations periods as short as one year to be reasonable. *See Wechsler*, 2016 WL 1688012, at *2-*3 (enforcing the one-year contractual limitations period in HSBC’s deposit account agreement); *Wechsler*, 2017 WL 66586, at *1 (“In general, New York courts have found one-year limitations clauses to be reasonable”). Numerous cases have enforced one- and two-year contractual limitations periods. *See, e.g.*, *No Hero Enters. B.V. v. Loretta Howard Gallery Inc.*, 20 F. Supp. 3d 421, 425 (S.D.N.Y. 2014) (upholding two-year limitations period in insurance contract); *City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635, 637-38, 981 N.Y.S.2d 736, 737 (2d Dep’t 2014) (enforcing contractual agreement to reduce limitations period to two years in performance bond contract); *Vinci v. Westchester Co. Health Care Corp.*, 55 A.D.3d 599, 600, 866 N.Y.S.2d 230, 231 (2d Dep’t 2008) (enforcing two-year limitations provision in medical services contract); *Renee Knitwear Corp. v. ADT Sec. Sys.*, 277 A.D.2d 215, 216, 715 N.Y.S.2d

341, 341 (2d Dep't 2000) (upholding one-year contractual limitation period and stating "[i]t is well settled that parties to a contract may agree that a lawsuit must be commenced within a shorter period than that prescribed by law.").

The Deposit Account Agreement provides that "any lawsuit" against Chase must be brought within two years from the date the cause of action arises. Deck Decl. Ex. 1 § I.9. It thus shortens the statute of limitations for all of plaintiffs' claims, which would otherwise be six years (or, in the case of fraud, six years or two years from the date when the fraud could reasonably have been discovered, if the later period is longer). CPLR 213(2), (8).

According to the SAC, Williams presented the Power of Attorney to Chase, and pursuant to it, established a joint account with Abrahams, between July 12, 2012, when the Power of Attorney was executed, and a date prior to November 1, 2012, when Abrahams died. ¶¶ 26, 28, 43. Thus, plaintiff's claims accrued no later than November 1, 2012 and any action against Chase was required to be filed prior to November 1, 2014. Moreover, because Chase gave plaintiff the bank account statements on Abrahams' account in January 2013, ¶ 99, she had the relevant information long before the expiration of the contractual limitations period, and nothing prevented her from filing her lawsuit promptly, and certainly within two years of November 1, 2012. *See Wechsler*, 2017 WL 66586, at *1 (upholding HSBC's one-year contractual limitations period and noting that "nothing prevented Wechsler from filing his lawsuit within a year of the first" improper banking fee). Because plaintiff did not file her complaint until October 19, 2016, all of her claims are time-barred.

POINT V

TO THE EXTENT THAT PLAINTIFF ASSERTS CLAIMS IN HER INDIVIDUAL CAPACITY, HER CLAIMS SHOULD BE DISMISSED FOR LACK OF STANDING

Plaintiff sues both as the representative of Abrahams' estate, and in her individual capacity. Weiss Decl. Ex. 1, introductory paragraph. If the Court does not dismiss the SAC in its entirety, then the Court should dismiss the claims that plaintiff asserts in her individual capacity for lack of standing.[4]

Plaintiff purports to sue in her individual capacity because she allegedly was Abrahams' sole beneficiary under the will she claims is the valid will. ¶ 23. It is well-settled, however, that the beneficiaries of an estate do not have standing to bring an action to recover property of the estate. *Lucas v. Tiernan*, No. 07 Civ. 2011, 2006 WL 4808614, at *3-*4 (S.D.N.Y. Sep. 27, 2006) (executors/beneficiaries lack standing to assert individual claims to recover amounts paid on behalf of estate); *Stallsworth v. Stallsworth*, 138 A.D.3d 1102, 1102-03, 30 N.Y.S.3d 661, 662-63 (2d Dep't 2016) (dismissing action brought by individual beneficiaries to recover asset of the estate); *Castor v. Pulaski*, 117 A.D.3d 1552, 1553-54, 985 N.Y.S.2d 380, 381 (4th Dep't 2014) (dismissing sole heir's action for damages alleging probate of a fraudulent will); *Jackson v. Kessner*, 206 A.D.2d 123, 126, 618 N.Y.S.2d 635, 637 (1st Dep't 1994) (individual claim of executrix and sole beneficiary of estate for malicious prosecution dismissed), *leave to appeal dismissed*, 85 N.Y.2d 967, 629 N.Y.S.2d 726 (1995).

Accordingly, to the extent that plaintiff purports to sue in her individual capacity, her claims should be dismissed.

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[4] The standing motion is asserted pursuant to Fed. R. Civ. P. 12(b)(1). *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.A.R.L.*, 790 F.3d 411, 416-17 (2d Cir. 2015).

CONCLUSION

For all the foregoing reasons, the SAC should be dismissed with prejudice.

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